

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

843

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23, 940

FREDDIE M. ALSTON,
Appellant

v.

DISTRICT OF COLUMBIA,
Appellee

APPEAL FROM THE DISTRICT
OF COLUMBIA COURT OF APPEALS

United States Court of Appeals
for the District of Columbia Circuit

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FILED JUN 24 1970

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

NO. 11, 040

WILLIAM J. WATSON
Appellant

DISTRICT OF COLUMBIA
Appellee

APPEAL FROM THE DISTRICT
OF COLUMBIA COURT OF APPEALS

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(excerpts)

STATEMENT OF ISSUES

I.

Whether the District of Columbia Court of Appeals committed error when it reversed the District of Columbia Juvenile Court's order granting pretrial discovery in a delinquency proceeding as being beyond the scope of the Juvenile Court's authority?

II.

Whether a juvenile charged with delinquency is entitled under the "due process" clause of the Fifth Amendment to such discovery as the Juvenile Court judge, in the exercise of his discretion deems necessary to a fair trial?

III.

Whether a juvenile charged with delinquency is entitled under the "equal protection" clause of the Fourteenth Amendment to the same pretrial discovery as is available to an adult criminal defendant?

IV.

Whether a juvenile charged with delinquency is deprived of the right to cross-examine witness effectively and the right to effective assistance of counsel under the Sixth Amendment if denied pretrial discovery viewed by the

Juvenile Court judge as necessary to the preparation of the defense?

STATEMENT OF WHETHER THIS CASE
HAS PREVIOUSLY BEEN BEFORE THIS COURT

This case was before this Court under the same name and number on a Motion for Leave to Appeal from the District of Columbia Court of Appeals and on the Motion of Appellant to extend time for filing this brief. It has not been before the Court on any other occasion.

REFERENCES AND RULINGS

An opinion was written by the District of Columbia Court of Appeals in this case; to wit, District of Columbia v. Freddie M. Alston, ___ A. 2d. ___ (Slip opinion #4936, decided 1/28/70.) An order was entered in this case in the Juvenile Court for the District of Columbia, dated November 6, 1968, by the Hon. John D. Fauntleroy. The order is not published.

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STATEMENT OF THE CASE

On October 27, 1967 appellant Freddie M. Alston was arrested and charged with a rape that allegedly occurred on June 29, 1967. At the time of the offense appellant was sixteen years of age and thus within the jurisdiction of the Juvenile Court of the District of Columbia D.C. Code § 11-1551(2). A delinquency petition charging appellant with rape was filed on December 15, 1967, a denial was entered by appellant and a jury trial requested. Counsel for appellant filed a pretrial discovery Motion in the Juvenile Court on June 6, 1968, the Corporation Counsel filed written opposition and a hearing was held on September 27, 1968 before the Hon. John D. Fauntleroy.

Judge Fauntleroy granted the appellant's motion in substantial part with the proviso that non-compliance by the Corporation Counsel with the Court's order would result in dismissal of the petition. The Corporation Counsel declined to comply; the petition was dismissed on February 10, 1969. An appeal was taken by the Corporation Counsel to the District of Columbia Court of Appeals, which on January 28, 1970, reversed the action of the Juvenile Court and ordered the delinquency petition reinstated.

From that order appellant petitioned this Court for leave to appeal. This Court allowed the appeal on April 14, 1970. This Court properly has jurisdiction of the case under D.C. Code § 11-321.

STATEMENT OF FACTS

On June 29, 1967, the Metropolitan Police Department received a report of a rape which allegedly occurred at 201 N St., S.W. at 10:45 P.M. The assailant was said to have removed a pair of scissors from the complainant's purse and forced her to submit to sexual intercourse. No one was apprehended for this offense until October 27, 1967 when the complainant notified the police that she had seen her assailant again. Appellant Freddie M. Alston was subsequently arrested, taken into custody, fingerprinted and required to give pubic hair samples.

At the time of the alleged offense, appellant was sixteen years of age; consequently he was charged as a juvenile, pursuant to the provisions of D.C. Code § 16-2301, et. seq. A petition alleging that the appellant was delinquent, in that he had committed the offense of rape, was sworn to on December 15, 1967, and the appellant entered a denial. The case was set down for trial by jury.

Lacking knowledge of whether the scissors allegedly used in the offense were recovered, whether physical and scientific tests had been performed on the complainant shortly after the offense, whether objects which could be

used as evidence were removed from the scene of the offense, whether the complainant was shown photographs or sketches which served as a basis for her identification of appellant and whether any independent witnesses observed the offense, on June 6, 1968, appellant requested the Juvenile Court to direct the Corporation Counsel, charged with prosecuting the delinquency petition, to disclose certain information to him prior to trial. Appellant requested, inter alia, (1) copies of all statements made by him in connection with the case which were in the custody of the government; (2) the results and reports of all physical and mental examinations undertaken in this case, particularly fingerprint analyses, hair comparisons, blood tests and semen analysis; (3) all tangible evidence obtained from the scene of the alleged offense which the government may use in evidence at trial; (4) all photographs and sketches shown to prospective government witnesses in this case by the police or their agents; (5) the names and addresses of all government witnesses whom the government intends to call in its case; and (6) all other information and evidence which might be favorable to appellant.

At oral argument of the Motion in the Juvenile Court,

1. The first part of the report deals with the general situation of the country and the progress of the work of the Commission.

2. The second part of the report deals with the results of the work of the Commission in the various fields of activity.

3. The third part of the report deals with the financial situation of the Commission and the results of the work of the Commission in the various fields of activity.

4. The fourth part of the report deals with the results of the work of the Commission in the various fields of activity.

5. The fifth part of the report deals with the results of the work of the Commission in the various fields of activity.

6. The sixth part of the report deals with the results of the work of the Commission in the various fields of activity.

7. The seventh part of the report deals with the results of the work of the Commission in the various fields of activity.

8. The eighth part of the report deals with the results of the work of the Commission in the various fields of activity.

9. The ninth part of the report deals with the results of the work of the Commission in the various fields of activity.

10. The tenth part of the report deals with the results of the work of the Commission in the various fields of activity.

Hon. John D. Fauntleroy presiding, appellant contended that the pretrial discovery requested was essential to his effective preparation of the defense, and that denying him the requested information would deprive him of a fair trial and thus of the due process of law. (T.3). An equal protection claim was also raised. In opposition to the Motion, the Corporation Counsel asserted that the Juvenile Court lacked inherent authority to order pretrial discovery.

The Juvenile Court granted the Motion of appellant as to physical evidence, scientific test results, and statements of the accused. The Corporation Counsel was ordered to supply appellant with the names and addresses of government witnesses ten days prior to trial. Appellant's requests for records of prior sex assault complaints made by the complainant and for the statements of witnesses whom the government did not intend to call to testify were denied. The Court indicated as the basis for its ruling the following:

...this Court believes respondent in this Court would be entitled to the same discovery as an adult would be over at the United States District Court, or the Court of General Sessions.
(T. 38)

The Court further ruled that failure on the part of the Corporation Counsel to comply with its order would result in dismissal of the delinquency petition.

On February 10, 1969, appellant moved to dismiss the delinquency petition since the Corporation Counsel had refused to comply with the Juvenile Court's discovery order of November 6, 1968. Appellant's motion was granted. The Corporation Counsel appealed this action to the District of Columbia Court of Appeals, and on January 28, 1970, that Court reversed the Juvenile Court and remanded the appellant's case to the Juvenile Court for trial. In its opinion the District of Columbia Court of Appeals held that the Juvenile Court judge was without authority to order the discovery of the matters requested. The Court further ruled that since a juvenile delinquency proceeding is not a "criminal case" and since trial recesses could be granted should surprise at trial develop, discovery was unnecessary. District of Columbia v. Alston, ___ A.2d. ___ (Slip Op. #4936, decided 1/28/70).

ARGUMENT

I.

THE JUVENILE COURT JUDGE HAS INHERENT AUTHORITY TO ORDER PRETRIAL DISCOVERY IN A DELINQUENCY PROCEEDING WHEN HE DETERMINES FAIRNESS REQUIRES DISCLOSURE.

Judges of the Juvenile Court are vested with broad discretion in their proceedings, discretion deriving not only from that inherent to any trial court judge but also from the parens patriae philosophy that underlies the Juvenile Court Act. D.C. Code §16-2316 directs the Juvenile Court to construe liberally the provisions of the Juvenile Court Act so that the best interests of the juvenile are served. Discretion is to be exercised not only at the dispositional phase of the case, but prior to trial as well, since the rehabilitative objectives of the Court come into play at the inception of the juvenile proceeding. Creek v. Stone, 126 U.S. App. D.C. 329, 379 F. 2d. 106 (1967).

That the Juvenile Court judges have discretion prior to trial was recently confirmed by this Court in Rice v. District of Columbia, 128 U.S. App. D.C. 194, 385 F. 2d. 976 (1967). In Rice, the Juvenile Court judge held an ex parte hearing on the merits of an alleged assault and excluded the assistant Corporation Counsel. On the basis of this hearing, the delinquency petition was dismissed.

This Court approved the Juvenile Court judge, holding that he acted within his discretion not only in conducting the hearing ex parte but in dismissing the case.

Rice v. District of Columbia implicitly over-rules the District of Columbia Court of Appeals' rulings in In Re Ketcham, D.C. App. (unpublished opinion, No. 2773 Original decided 6/29/64). In Re Ketcham, D.C. App. (unpublished opinion Nos. 2704 and 2705 decided 6/26/64) and In Re Ketcham, D.C. App. (unpublished opinion No. 2716, decided 6/26/64) upon which the Corporation Counsel placed great reliance in his brief below. By confirming the authority of the Juvenile Court to hold precisely the kind of hearing which, in the In Re Ketcham series the D.C. Court of Appeals had prohibited, this Court has implicitly over-ruled those cases. Moreover, in Cooley v. Stone, ___ U.S. App. D.C. ___, 414 F. 2d. 1213 (1969) this Court held it was error which required the issuance of a writ of habeas corpus for a Juvenile Court judge not to hold a preliminary hearing - the very hearing which the D.C. Court of Appeals had prohibited in Ketcham. For the District of Columbia Court of Appeals to thus revive the dead holdings of the Ketcham cases - as it did in the instant case, District of Columbia v. Alston ___ A. 2d. ___,

(No. 4936, decided 1/28/70, at Slip op. p. 3), is to breathe life into a corpse.

While reversing the Juvenile Court's discovery order of November 6, 1968, the D.C. Court of Appeals nevertheless recognized that the Juvenile Court has in the past and may continue to grant some discovery prior to trial. The D.C. Court of Appeals said:

It may eventuate at the outset of the hearing that the trial judge will decide in the interest of fairness to grant the juveniles prior inspection of such things as any statements made by them to the police or laboratory reports. (Slip op. p. 4)

Although it did not specifically resolve the apparent contradiction between the above language and the reversal of the Juvenile Court, presumably what was intended was a holding that the Juvenile Court judge could grant "discovery" at the outset of the trial but not before. Such a rule would constrict the Juvenile Court's discretion to the

point of virtual elimination. The D.C. Court of Appeals omitted mention of why the Juvenile Court's discretion is wide enough to allow discovery a few moments prior to trial but not so broad as to authorize it a few weeks prior to trial when it can be useful in the preparation of the defense.

It would be anomalous to hold that Juvenile Court judges lack the wide-ranging discretion in the discovery area which is universally recognized as available to criminal trial judges. The Federal Rules of Criminal Procedure do not create this discretion, they guide it and implement it. The discretion available to all trial judges was demonstrated in U.S. v. Smith, 16 F.R.D. 372 (W.D.Mo. 1954) when District Judge (later Associate Justice) Whitaker required the government to disclose the location, time and place of narcotic sales. Although not required by the Federal Rules of Criminal Procedure, the judge's action was praised as a "wise use of...discretion." by the Advisory Committee on the Federal Rules of Criminal Procedure, 34 F.R.D. 411 at 417.

The case of U.S. v. Palmisano, 273 F. Supp. 750 (S.D.N.Y. 1967) further demonstrates that the Federal

Rules of Criminal Procedure neither created nor constricted the broad discovery which trial judges inherently possess:

Neither the language of the statute nor its legislative history reveals a purpose to deprive this Court of its traditional and important discretion to require limited disclosure of the identity of persons in non-capital cases where such disclosure is essential to give the defendant a fair opportunity to prepare his defense. Indeed, to so read it [the statute] would be to raise questions of its constitutionality under the Fifth and Sixth Amendments. citing Fontana v. U.S. 262 F. 2d. 233 (CA 8, 1919) ¹ 273 F. Supp. 750 at 752 (emphasis added)

Paralleling the inherent discretion of the Juvenile Court judge to grant such pretrial motions as serve the interests of the juvenile is his power under the All

¹ /
See also U.S. v. Anderson, 254 F. Supp. 177 (W.D. Ark. 1966.) (required disclosure of dates, amounts, and payors of each of items of allegedly unreported income); U.S. v. Tucker, 262 F. Supp. 305 (D.C.S.D.N.Y. 1966) (identity of drug purchases must be disclosed); Jencks v. U.S. 353 U.S. 657 (1956) (trial judge has discretion to order disclosure of prior written statements of government witnesses pretrial).

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Writs Statute to develop procedures in aid of the court's jurisdiction:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages of the law." 28 U.S.C. § 1651

Morrow v. District of Columbia, ___ U.S. App. D.C. ___,

417 F. 2d. 728 (1969) made clear the application of this statute to all courts in the District of Columbia. Under Morrow's holding, the D.C. Court of Appeals, although not a court "of the United States"^{2/} was reached by the All Writs Statute because it was "established by Act of Congress." The Juvenile Court is in the identical position, having been created by Congress.

The All Writs Statute empowers a trial judge to order discovery when he deems it appropriate. Harris v. Nelson 394 U.S. 286 (1969). In Harris, a prisoner sought to take written interrogatories in support of his habeas corpus application. The district court granted his request, but the Ninth Circuit reversed, holding that neither the

^{2/}

See 28 U.S.C. §451 for a definition of "courts of the United States."

Federal Rules of Civil or Criminal Procedure applied to a habeas petitioner. In reversing the Ninth Circuit, the Supreme Court held that, even though the Federal Rules did not afford the petitioner discovery through the normal channels, the All Writs Statute provided the trial court authority to order the taking of interrogatories:

Clearly, in these circumstances, the habeas corpus jurisdiction and the duty to exercise it being present, the courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage. Where their duties require it, this is the inescapable obligation of the courts. Their authority is expressly confirmed in the All Writs Statute, 28 U.S.C. §1651. This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve the rational ends of law." Price v. Johnson 334 U.S. 266, 282 (1948), quoting Adams v. U.S. ex rel. McCann, 317 U.S. 260, 273 (1942). It has been recognized that the courts may rely upon this statute in issuing orders appropriate to assist them in conducting factual inquiries.³ (emphasis added)

It thus appears that the All Writs Statute enables the Juvenile Court, just as it enables any other trial

³ /
394 U.S. at 399, citing American Lithographic Co. v. Werckmeister, 221 U.S. 603, 609 (1911) (subpoena duces tecum); Bethlehem Shipbuilding Corporation v. NLRB, 120 F. 2d. 126, 127 (CA 2 1941) (order that certain documents be produced for the purpose of pretrial discovery).

level court, to fashion discovery orders when, in the exercise of its discretion, it determines that such is necessary to promote fairness in the case. Only an abuse of discretion in the exercise of this power could serve as a basis for reversal by the D.C. Court of Appeals. LaBuy v. Howes Leather Co., 352 U.S. 249 (1957). Plainly, in the case at bar, the discovery order issued by the Juvenile Court was issued to "assist...in conducting factual inquiries." Harris v. Nelson 394 U.S. at 299. Furthermore, the scope of the discovery order was reasonably related to the nature and seriousness of the charges. Indeed, no more discovery was allowed appellant by the Juvenile Court than he would have received had he been an adult.

Since the Juvenile Court judge has inherent authority as a trial judge to order the pretrial disclosure of important information in a delinquency proceeding, and since the All Writs Statute affords him an alternate source of authority to issue the discovery order which is the subject of this case, the District of Columbia Court of Appeals erred in reversing the Juvenile Court for exceeding its authority.

II

DUE PROCESS OF LAW REQUIRES THAT JUVENILES CHARGED WITH DELINQUENCY HAVE A RIGHT TO DISCOVER PRIOR TO TRIAL SUCH ELEMENTS OF THE PROSECUTOR'S CASE AS ARE NECESSARY TO ENSURE THE YOUTH A FAIR TRIAL

Appellant stands charged in the Juvenile Court with the serious offense of rape. He has reason to believe that the prosecutor possesses scientific, documentary and eye-witness evidence bearing on guilt or innocence. Much of this evidence is unavailable to him except by disclosure of the prosecutor. To ensure that the appellant received a fair trial, to minimize surprise at trial and to allow the appellant adequately to prepare for trial, the Juvenile Court ordered the Corporation Counsel to disclose certain information to appellant. The Juvenile Court's order was designed to secure the appellant's due process right to a fair trial. It was in conformity with case law holding the defendant in a criminal case has a due process right to discover information material to guilt; it was in conformity with case law indicating that the defendant in a criminal case is entitled under principles of fundamental fairness to

consult with witnesses; it was in conformity with the recent trend towards expanded discovery at many phases of the criminal proceeding. And it was in conformity with the basic assumptions of the adversary system of justice. The District of Columbia Court of Appeals reversal of the Juvenile Court order would deny appellant a fair trial by preventing the pretrial disclosure and would be contrary to the weight of all authority.

In 1970 there can be no doubt that a juvenile charged with delinquency is entitled to the procedural safeguards which constitute "due process of law" in the adult criminal justice system. This is the import of In re Gault, 387 U.S. 1 and of In re Winship, ___U.S.___, 7 Cr L 3007 (decided March 31, 1970). The application of due process to juveniles in this Circuit can be seen recently in Cooley v. Stone, ___ U.S. App. D.C.___, 414 F.2d. 1213 (1969). It is a constitutional mandate that juveniles facing the prospect of penal custody have a right to fundamental fairness at all stages of the case. In re Winship, supra.; In re Gault, supra.; Kent v. United States, 383 U.S. 341 (1966); Smith v. Bennett 365 U.S. 708 (1961).

Four themes in the current law demonstrate that pretrial disclosure of key elements of the prosecution's case is so essential to ensuring a fair trial that it must be considered a part of due process: (a) cases holding a criminal defendant has a right to information favorable to his defense; (b) cases holding that a criminal defendant has a right to access to government witnesses; (c) cases holding that Grand Jury Minutes must be made available to the criminal defendant; and (d) the American Bar Association's Minimum Standards for Criminal Justice.

(a) Cases guaranteeing a criminal defendant access to information favorable to him.:

As long ago as 1935 the Supreme Court held that a defendant in a criminal case is denied due process if the prosecutor suppresses information which is material to guilt and which could have been favorable to the accused. Mooney v. Holohan, 294 U.S. 103 (1935). More recently in Brady v. Maryland, 373 U.S. 83 (1963) and in Giles v. Maryland, 386 U.S. 66 (1967) the Supreme Court has affirmed that "due process" implies a duty on

the part of the prosecutor to disclose exculpatory material to the defendant. In Brady the Court said:

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. 373 U.S. at 87

In Giles v. Maryland, 386 U.S. 66 (1967) the Supreme Court emphasized the infringement on due process that would result if a defendant's conviction were based on less than all the evidence. Mr. Justice Fortas, in his concurring opinion, emphasized that the function of a trial is a search for truth, and that openness ensures the fairness of the proceeding. He stated:

The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses. 386 U.S. at 98

Under the Brady - Giles line of cases, a wide range of material has been held to be discoverable by the defense on the grounds of due process, if in the possession of the government and bearing on the issue of guilt or of punishment. Brady, for instance, concerned itself with the statement of a co-defendant which, if introduced by the defense, could have mitigated the defendant's sentence. Giles held that reports relating to the complaining witness' character could have been exculpatory material which should have been turned over to the defense. Similarly, at the appellate and trial court level, such items as scientific evidence (ballistic and fingerprint reports) have been held discoverable. Barbee v. Warden 331 F. 2d. 842 (4th Cir. 1964). Identification evidence known or available to the prosecution is within the ambit of Brady. Jackson v. Wainwright 390 F. 2d. 288 (5th Cir. 1968) Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962), as is information regarding eye-witnesses and their statements to the police. Williams v. Dutton, 400 F. 2d. 797 (5th Cir. 1968).

The central feature of all the Brady type cases is not what kind of evidence is involved, or even its admissibility, but what its impact on the defense could be. If the evidence might be helpful, and if it is in the possession of the prosecution, the due process clause requires its disclosure to the defense and the court; or, at the very least, the Court should inspect the evidence in camera to determine its value to the defense. The reason behind this principle has been clearly stated by the Supreme Court in Dennis v. U.S.:

In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. 384 U.S. 855 at 873 (1966).

The policy for requiring government disclosure has been articulated in this circuit by Chief Judge Bazelon in his concurring opinion in Williams v. United States 129 U.S. App. D.C. 332, 338, 394 F 2d. 957, 933 (1968) as follows:

The 'sporting' theory of justice is no longer appropriate in criminal cases; the stakes are far too high, and the sides too unequal. Particularly in the case of an indigent defendant represented by court-appointed counsel,

the government's resources are overwhelmingly superior. Elemental principles of fairness and decency thus demand that the government lend needed assistance to obtain any witness sought in good faith by the defense. (footnotes omitted)

The Brady chain of cases clearly establishes that discovery in a criminal case may be required by the due process clause of the Fifth Amendment. Since Brady, Giles and most cases relying on them came to the appellate courts in the posture of post-conviction collateral attacks, these cases place more emphasis on the right of the defense to discover the information than at what point in the progress of the case the right attaches. While no timetable emerges from Brady or Giles the rationale suggests that disclosure should be sufficiently in advance of trial to be of value to the defense. In short, pretrial disclosure is required under the due process clause.

(b) Cases holding that a criminal defendant has a due process right to government witnesses.

A signal development in the area of adult criminal discovery in this jurisdiction is represented by the case of Gregory v. U.S. 125 U.S. App. D.C. 140, 369 F. 2d. 185 (1966). In that case, the prosecutor had

suggested to government witnesses that they refrain from speaking with defense counsel prior to trial. Holding that this amounted to a concealment of evidence, this Court found that the defendant had been denied due process at trial since he could not effectively prepare his defense. The Court stated as follows:

Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have equal right, and should have an equal opportunity which, not only the statute [18 U.S.C. §3432] but elemental fairness and due process required that he have...125 U.S. App. D.C. at 143,369 F. 2d. at 188.

The significance of Gregory far transcends the facts of that case; the Court's holding implies that a defendant's right to a fair trial - and thus his right to due process of law - is jeopardized when such key evidence in the case as eye witnesses are made unavailable to him prior to trial. By simple extension it would seem that if the government concealed or made unavailable any other evidence of similar value - such as the scientific tests in a rape case - this Court would find a violation of due process under the Gregory

rationale. The lack of authorities for the extension of Gregory into this area can be accounted for by the fact that the Federal Rules of Criminal Procedure provide sufficient access for the adult defendant to this information to preclude the development of the problem. However, the implication of Gregory is inescapable: due process and fairness at trial require pretrial disclosure of significant evidence.

(c) Cases requiring disclosure of Grand Jury Minutes to adult defendants.

Another demonstration of liberalized discovery in adult criminal proceedings may be seen in the area of Grand Jury Testimony. In this Court's opinion in Gary Harris v. U.S., ___ U.S. App. D.C. ___, ___ F. 2d. ___ (Slip op. #21,511; decided 3/18/70 en banc), it was held that a defendant requesting grand jury minutes previously considered to be unavailable to defendants as a matter of right, is entitled to them at the time of trial. The Court balanced the competing interests favoring secrecy of grand jury proceedings on the one hand, with the requirements for a fair trial mandating maximum disclosure on the other. On balance the Court

concluded that the defendant's right to information relevant to his case is paramount and requires the disclosure. The reasoning of Harris suggests the defendant's right to a fair trial deserves great weight when being balanced with other interests which militate against disclosure. By implication, when there is no justification for secrecy - as in the instant case - the disclosure of relevant material bearing on guilt or innocence should be automatic, under the due process clause.

(d) Standards of the American Bar Association

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial demonstrate the breadth of the movement towards liberalized discovery to ensure fairness at trial. §§ 2.1, 2.2, 2.3 and 2.4 of those standards spell out the prosecutor's obligation to disclose information of a scientific character, information concerning potential witnesses, expert testimony and statements or documents seized from the defendant in a criminal case. (See Appendix "B" for Standards). In promulgating its standards relating to

discovery, the ABA noted as follows:

Generally, an attorney can be effective in trial only to the extent that he has the information necessary to plan effectively... Where planning is foreclosed by lack of information, as has long been the custom in much of criminal litigation, surprise and gamesmanship usually govern the conduct of the proceedings. The result is too often a general obfuscation of the issues...Where life, liberty and the protection of communities from crime are the stakes, gamesmanship is out of place. ABA Standards, op. cit., p. 31

To implement the objectives of discovery - including minimization of surprise, expeditious processing of cases and opportunity to consider pleas of guilty - the ABA Standards require the prosecution to disclose the relevant information "as soon as practicable following the filing of charges." §2.2.

Although the ABA Standards have no weight as precedent they are significant insofar as they reflect the current thinking of the legal community as to what fairness requires in the area of discovery. Plainly the fact the the ABA Standards are designed for the criminal justice system cannot undermine the value they have as guidance to this Court in supervising the juvenile justice system.

The aggregate impact of the Brady v. Maryland cases, the Gregory case, the Harris opinion and the ABA Standards is that the contemporary view of fairness and due process includes the disclosure to the defense of matters relating to guilt or innocence sufficiently in advance of trial to be useful to the preparation of the case. Only when an over-riding consideration dictates secrecy is the due process concept to give way.

Application of Law to Instant Case:

In the case at bar, appellant requested the pre-trial production of ten categories of evidence. After hearing oral argument (see Transcript) in which the appellant proffered the need for each category, the Court ordered that the Corporation Counsel supply the requested information in six of the ten categories as soon as possible, and two within ten days of trial; and in two categories the Court denied the appellant's request. As a penalty for non-compliance, the Juvenile Court ordered on February 18, 1969, that the delinquency petition be dismissed. This order was subsequently reversed by the District

of Columbia Court of Appeals.

In the proceedings below, the District of Columbia Court of Appeals, acknowledged the application of the "due process" clause and the Brady v. Maryland, 373 U.S. 83 doctrine to juvenile proceedings. However, the D.C. Court of Appeals took the view that due process did not entitle appellant to the information he requested - at least not prior to trial. The apparent basis of the Court's opinion was that "flexible and informal procedures are essential to the parens patriae function of the Juvenile Court." (Slip op., p. 3). Whether such flexibility was furthered by the Court's ruling that the trial judge lacked the discretion to order discovery in any case is problematic. More important, the D.C. Court of Appeals anchored its ruling that due process does not include criminal discovery on the 1958 case of Cicenia v. LaGay 357 U.S. 504. Apart from the fact that Cicenia v. LaGay was expressly over-ruled by Escobedo v. Illinois, 378 U.S. 436 (1966), at most it can be seen as holding that a defendant entering a plea of nolo contendere is not entitled to see his confession. Whether Cicenia is entitled to any weight today, it

surely does not stand for the proposition that due process does not require discovery in criminal cases. To the extent that the D.C. Court of Appeals opinion is based on this misapprehension, it should not be allowed to stand.

Neither the D.C. Court of Appeals in its opinion nor the Corporation Counsel in his brief below offered any policy in opposition to pretrial discovery. The Court simply held that discovery at trial or trial recesses would be adequate substitutes for pretrial discovery, which therefore was unnecessary:

It may eventuate at the outset of the hearing that the trial judge will decide in the interests of fairness to grant the juveniles prior inspection of such things as any statements made by them to the police or the laboratory reports...the trial court in its discretion may grant a continuance so they [appellant] may effectively confront such evidence. (Slip op. at p. 4)

Apart from the obvious costs of trial interruptions to an over-worked court such as the Juvenile Court⁴ it is clear that discovery at trial coupled with a recess cannot possibly substitute for pretrial discovery and preparation.

⁴ See, Court Management Study, A Study of the Juvenile Court of the District of Columbia (1970).

It is apparent that a juvenile seeking to counter the effect of an expert witness whom he did not expect or whose interpretations seemed questionable would be put to a severe disadvantage if he was not put on notice of the problem until trial.

If the District of Columbia Court of Appeals' decision is allowed to stand, and a juvenile denied any discovery as a matter of right, appellant and others similarly situated will be at the mercy of the prosecutor, dependent upon his whims for knowledge of the case, the lack of which could cause a conviction and incarceration that might not have resulted had the defense been fully informed. Forcing the appellant to depend upon the prosecutor's largesse would be intolerable:

The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut danger to individuals who are identified by the testimony produced. Dennis v. U.S. 855 at 875 (1966) (footnote omitted)

See also, Williams v. Dutton, 400 F. 2d. 797 (4th Cir. 1968), Gregory v. U.S., 125 U.S. App. D.C. 140, 369 F. 2d. 185 (1966), Griffin v. U.S., 87 U.S. App. D.C. 172, 183 F. 2d. 990 (1950). Note, The Duty of the Prosecutor to Disclose Exculpatory Evidence, 60 Col. L. Rev. 858 (1960); Note, Disclosure of Prosecutor's Evidence, 42 NYU L. Rev. 764 (1967).

Appellant submits that the order of the Juvenile Court of November 6, 1968, granting him the requested pretrial discovery merely implemented the commands of the Due Process Clause as interpreted, and that the District of Columbia Court of Appeals erred in reversing that order, since the deprivation of that pretrial discovery would violate the defendant's due process rights to a fair trial.

III.

DENYING APPELLANT SUCH PRETRIAL DISCOVERY AS WOULD HAVE BEEN AVAILABLE TO AN ADULT CHARGED WITH RAPE DEPRIVES APPELLANT OF THE EQUAL PROTECTION OF THE LAW.

Appellant stands charged in the Juvenile Court with the offense of rape, which, at the time of appellant's arrest would have been a capital offense if charged against an adult, D.C. Code §22-2801. Had appellant been more than 18 years of age at the time of the offense, he would have been entitled to wide pretrial discovery pursuant to the United States Constitution and the Federal Rules of Criminal Procedure. An adult charged with this offense would have been entitled to copy or inspect prior to trial:

- (a) any statements made by the accused, Fed. R. Crim. P., Rule 16 (a) (1);
- (b) the results or reports of physical examinations or scientific tests, such as hair comparisons, blood and semen analysis and examinations of the complainant, Fed. R. Crim. P., Rule 16 (a) (2);
- (c) clothing worn by the complainant at or immediately prior to the alleged assault, Fed. R. Crim. P., Rule 16 (b);
- (d) any books, documents, papers or other tangible evidence taken from the scene of the offense which might be used as evidence at trial (other than government reports), Fed. R. Crim. P., Rule 16 (b);
- (e) any photographs or pictures shown to prospective

government witnesses, Fed. R. Crim. P., Rule 16 (b);

(f) names and addresses of government witnesses ten days
prior to trial, 18 U.S.C. § 3432.^{5/}

Solely by virtue of appellant's age, appellant would be denied the valuable benefits of this information, yet without an excuse to justify the denial.

When granting appellant's discovery motion in the Juvenile Court, that Court indicated its belief that a discrimination against youths which would result in the denial of information needed to prepare their cases would not be justified. The Court stated:

...This Court believes Respondent [appellant] in this Court would be entitled to the same discovery as an adult would be over at the United States District Court or the Court of General Sessions. (T.39)

The Juvenile Court implicitly recognized when ordering pretrial discovery that neither the fortuitous circumstance of appellant's age nor the denomination of juvenile proceedings as "civil" rather than "criminal" could justify

^{5/}
At the time of appellant's arrest, rape was a capital offense in the District of Columbia. However, under Bailey v. United States 132 U.S. App. D.C. 82 405 F. 2d. 1352 (1968) rape is no longer capital in this jurisdiction.

the denial of discovery. The Juvenile Court's rationale is supported by the philosophy of In Re Gault 387 U.S. 1 (1967) and In Re Winship, ___ U.S. ___ 7 Cr. L. 3007 (decided 3/31/70) where the Supreme Court held:

...civil labels and good intentions do not themselves obviate the need for criminal due process safe-guards in juvenile courts. 7 Cr. L. 3007 at 3009-3010

While the equal protection guarantee of the Fourteenth Amendment does not require parallel treatment of juveniles and adults at every stage of the proceedings, it is apparent that no valid interest of the State is served by employing fewer procedural protections for juveniles at the adjudicatory stage of the proceeding. True, there is room for and need of different treatment for juveniles than that accorded adults at the disposition (sentencing) phase of the case. Valid interests of justice are served by protecting the record of juveniles; thus, secrecy prevails at the post-adjudicatory phase of the case. Rehabilitative goals may be achieved more readily by use of a less formal, more wide-ranging sentencing approach than that used in the adult criminal justice system. Thus, the justifiable difference between juvenile and adult disposition provisions.

At the fact-finding portion of the case, on the other hand, the Supreme Court has recognized a need for information of equal quality with that obtained at a criminal trial, to ensure that only those juveniles actually in need of juvenile court supervision come within its jurisdiction.

The same considerations which demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child. In Re Winship, ___ U.S. ___, 7 Cr. L. 3007 at 3009 (3/31/70).

In In Re Winship, the Supreme Court rejected the argument of the State of New York that introducing the "beyond reasonable doubt" standard of proof would undermine the beneficial features of the juvenile court system:

Use of the reasonable doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not contribute to a criminal conviction; that such a finding does not deprive the child of his civil rights that juvenile proceedings are confidential. Nor will there be any affect on the informality, flexibility, or speed of the hearing at which the fact-finding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for individualized treatment will remain unimpaired. Similarly, there will be no effect on the procedures distinctive to juvenile proceedings which are employed prior to the adjudicatory hearing. 7 Cr. L. at 3010

Since no rational distinction could be offered for relying

on a less stringent standard of proof in the juvenile court than that applied to adult proceedings, the Supreme Court ruled that the same standard of proof must be met in both systems of justice.

The need for according the same rights to juveniles at the fact-finding stage as adults receive was recognized by the Supreme Court to avert a situation where, in the words of Mr. Justice Fortas,

...the child receives the worst of both worlds; that he gets neither the protections accorded adults nor the solicitous care and regenerative treatment postulated for children. Kent v. U.S. 383 U.S. 541 at 556 (1966)

To warrant the different treatment of juveniles and adults, a basis for the discrimination must be shown. Yet, in the area of pretrial discovery, "no reason is suggested or appears for a different rule." In Re Gault, 387 U.S. 1 at 56 (1967). Griffin v. Illinois, 351 U.S. 12 (1955). Quite the contrary, in juvenile proceedings, juveniles should receive additional, not fewer, protections than those afforded adult defendants. In Re Poff, 135 F. Supp. 224 at 225 (D.C.D.C. 1955).

If the aggregate impact of Kent, Gault and Winship, is that juveniles have the right to counsel, the right to

protection of the Fifth Amendment, the right to confront and cross-examine accusers and the right to proof beyond reasonable doubt, is it logical to deny them the benefits of pretrial disclosure? Does not pretrial discovery ensure the fulfillment of the premises of Kent, Gault and Winship?

IV.

DENYING APPELLANT PRETRIAL DISCOVERY WILL PREVENT HIM FROM EFFECTIVELY CROSS-EXAMINING WITNESSES AND WILL DEPRIVE HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

Long before the Supreme Court's In Re Gault decision, 387 U.S. 1 (1967) this Court held that a juvenile charged with delinquency is entitled to counsel. Shioutakon v. District of Columbia, 98 U.S. App. D.C. 371, 236 F. 2d. 666 (1956) stands for the proposition that due process requires "the effective assistance of counsel in a juvenile court quite as much as...in a criminal court." 98 U.S. App. D.C. at 374, 236 F. 2d. at 669 (emphasis added). The right to counsel was cemented by the Supreme Court's decision in Kent v. U.S. 383 U.S. 541 (1966). It is elementary that for counsel to be effective, he must be informed of the facts relevant to the case.

A lawyer is of little help if he has none of the trial tools with which to work. He cannot adequately defend if he is denied access to the facts.
State v. Eads, 5 Cr. L. 2137, 2138 (Iowa 1969)

In great measure, pretrial preparation consists of interviewing witnesses and examining documents which may be

used as evidence. If the witnesses or the documents are in the possession of the prosecutor and unavailable to the defense until trial, it follows that the trial preparation will be less comprehensive and that the defense will suffer.

Moreover, as every youth on trial, appellant has the right to confront and cross-examine witnesses. In Re Gault, 387 U.S. 1 (1967); Pointer v. Texas 380 U.S. 400 (1965). Cross-examination, of course, requires extensive preparation if it is to be useful and effective. This, in turn, requires access to the facts which will serve as the basis for testimony. Where the facts are unavailable to the defense until the moment of trial, cross-examination will have a duller appearance and a diminished impact. An ineffective cross-examination of a witness can be fatal to the defense. Alford v. U.S. 282 U.S. 687 (1930).

In the instant case, appellant's rights to effective assistance of counsel and to thorough cross-examination of witnesses would be severely jeopardized by the denial of pretrial discovery. Here, where the bulk of evidence against appellant, arrested four months after the alleged

offense, was assembled long before he knew of the charge, the need to discover the prosecutor's case as a predicate to effective cross-examination is clear. How can appellant know the basis of identification testimony, of scientific testimony, of fingerprint evidence if he is not informed prior to trial of the results of tests performed. Particularly where expert testimony can be anticipated, as it can in the case at bar, effective preparation of the defense requires early access to the reports and witnesses concerned.

The D.C. Court of Appeals suggests that a trial recess could be granted to allow counsel such time as might be necessary to prepare cross-examination, (District of Columbia v. Alston, op. cit. at p. 4). This would hardly suffice to appellant, accused of rape, facing numerous witnesses all strangers to him. Would he request a recess after each witness testified on direct examination? What impact would this have on the jury? Would it allow him sufficient time to prepare rebuttal testimony? To find and prepare experts in opposition to those offered by the government? The answers to these questions readily suggest

themselves. Would such an approach satisfy the due process standard if applied to an adult charged with rape?

Since appellant will be denied access to the information needed by his counsel to effectively cross-examine witnesses and thus to effectively prepare for trial, his rights under the Sixth Amendment will be abridged if the District of Columbia Court of Appeals decision is allowed to stand.

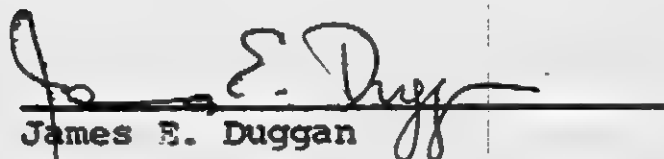
CONCLUSION

This Court should reverse the District of Columbia Court of Appeals action remanding this case for trial in the Juvenile Court dated February 10, 1969, dismissing the delinquency petition for failure to comply with the Juvenile Court's order of November 6, 1968. In the alternative, this Court should remand this case to the Juvenile Court for trial, conditioned upon the compliance of the Corporation Counsel with the Juvenile Court's November 6, 1968, discovery order.

Respectfully submitted,



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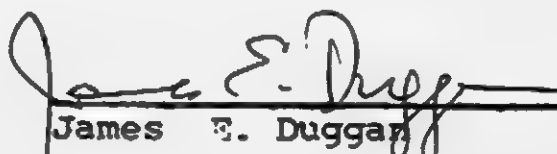


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Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Brief has been mailed, postage prepaid, to the Office
of the Corporation Counsel, Appellate Section, District
Building, 14th and E Sts., N.W., Washington, D.C., this
24th day of June, 1970.


James E. Duggan

APPENDIX "A"

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4934

DISTRICT OF COLUMBIA, APPELLANT,

v.

HENRY JAMES JACKSON, APPELLEE.

No. 4935

DISTRICT OF COLUMBIA, APPELLANT,

v.

CARLTON MERCHAND SIMPSON, APPELLEE.

No. 4936

DISTRICT OF COLUMBIA, APPELLANT,

v.

FREDDIE MARCELLEE ALSTON, APPELLEE.

Appeals from the Juvenile Court of the
District of Columbia

(Argued July 7, 1969

Decided January 28, 1970)

Richard W. Barton, Assistant Corporation Counsel, with whom *Charles T. Duncan*, Corporation Counsel, *Hubert B. Pair*, Principal Assistant Corporation Counsel, and *Leo N. Gorman*, Assistant Corporation Counsel, were on brief for appellant District of Columbia.

Anthony Nuzzo, Jr. for appellee in Nos. 4934 and 4936.

John A. Shorter, Jr. for appellee in No. 4935.

Before HOOD, Chief Judge, and KERN and GALLAGHER, Associate Judges.

GALLAGHER, *Associate Judge*: These are consolidated appeals by the District of Columbia from orders of the Juvenile Court dismissing petitions for discovery by juveniles. Each was charged separately with rape in violation of D.C. Code 1967, § 22-2861. In each case, the pre-trial discovery motions were filed and opposed by appellant. Though the Juvenile Court had no rule providing for discovery, it granted the motions in substantial part, and provided that the petitions would be dismissed if the District of Columbia did not make reasonable compliance. On the failure of the District to comply, they were dismissed. We have for decision whether the court erred in dismissing these petitions. We hold it did.

It is unnecessary to delineate with particularity the requests made in these motions. It is enough to say that they sought for production, inspection and perhaps copying such things as (a) any statements, confessions or admissions by the respondents, (b) the results of physical or mental examinations, (c) photographs and reports of any known and latent fingerprints and footprints made in this case, (d) reports or analyses of blood, semen, hair, skin, clothing and any other substance made in this case, (e) any records of previous complaints by these alleged victims of sexual assaults maintained by the Police Department, and (f) all other information and evidence which might be favorable to the respondents.

The basic question here is whether the refusal of the government to comply with the court's grant of the motions for discovery justified the dismissal of the three petitions. This in turn raises the question whether the refusal of the government to comply with the court's orders at a pre-trial stage of the proceedings cast the die for a deprivation of due process of law, a denial of equal protection of the law, or a deprivation of the right to effective assistance of counsel at trial. In other words, in a broad sense, did

the government's action at the pre-trial stage establish that the petitioners would not receive a fair trial. We might say at the outset that this court has ruled to the effect that there is no entitlement to pre-trial discovery in the Juvenile Court. *In re Ketcham*, D.C.App., (No. 2773 Original, decided July 29, 1964); *In re Ketcham*, D.C.App., (Nos. 2704 and 2705 Original, decided June 26, 1964); *In re Ketcham*, D.C.App., (No. 2716 Original, decided June 26, 1964). No statute has been enacted or rule of court adopted subsequently to affect those decisions. It would be ill-advised for this court to attempt to engraft pre-trial discovery procedures upon the Juvenile Court. This is a problem for consideration by that court as an entity.¹

This leaves whether the refusal of the government to comply with the pre-trial orders of the court amounted to a deprivation of the constitutional rights alluded to, then and there establishing a denial of the juveniles' rights to a "fair trial." We are unable to say that it did. The concept of fairness implicit in due process does not mandate discovery in adult criminal trials. *Cicenia v. Lagay*, 357 U.S. 504 (1958).

Appellants argue, further, that they are being denied equal protection of the law because they would obtain pre-trial discovery if they were defendants in a criminal proceeding in this jurisdiction. There is sufficient dissimilarity between juvenile proceedings and criminal proceedings, however, to deny application of the doctrine to this issue. Criminal trials are comparatively formalistic. But flexible and informal procedures are essential to the *parens patriae* function of the Juvenile Court, *Harling v. United States*, 111 U.S.App.D.C. 174, 177, 295 F.2d 161, 164 (1961); and we have not been made aware that the Juvenile Court in

¹ As this opinion indicates, this is yet another in a series of juvenile cases where individual judges have ordered some form of discovery.

this jurisdiction departs in practice from that philosophy. See *United States v. Dickerson*, 106 U.S.App.D.C. 221, 225, 271 F.2d 487, 491 (1959).

Appellants point to *In re Gault*, 387 U.S. 1 (1967), in support of this contention. But in encapsulating the scope of its decision in *Gault*, the court said:

[W]e do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *In re Gault*, 387 U.S. 1, 30 (1967), quoting *Kent v. United States*, 383 U.S. 541, 562 (1966).

Though the worth of pre-trial proceedings is now established, the distinction between criminal and juvenile proceedings is the basis to accord pre-trial discovery in one but not the other from the constitutional standpoint of equal protection of the law.

In any event, it is too early in the proceeding to make a judgment that a fair trial has already been denied to these juveniles. By the time the proceedings terminate their forebodings may vanish. It may eventuate at the outset of the hearing that the trial judge will decide in the interests of fairness to grant the juveniles prior inspection of such things as any statements made by them to the police or the laboratory reports. The record contains indication that the government has documents of this nature. While the government has here opposed application of the general concept of pre-trial discovery, it may well not oppose such specific requests, if made. In fact, to some extent the government seems to concede as much in its brief when it states that if adverse evidence of which

the juveniles are unaware is introduced, the trial court in its discretion may grant a continuance so they may effectively confront such evidence (Brief for appellant at 11). On the other hand, the court and parties may work out a more expeditious procedure than that in advance.

We think the petitions should be reinstated and the proceedings resumed. It hardly needs to be said that if the government is in possession of exculpatory information, this should be given to the juveniles as they requested. *Brady v. Maryland*, 373 U.S. 83 (1963). The rationale of *Brady* and its progeny should not be confined to adult criminal cases.

Reversed and remanded with instructions to vacate the dismissals of the petitions in these three cases and to set the proceedings for trials at the earliest dates practicable.



APPENDIX "B"

AMERICAN BAR ASSOCIATION MINIMUM STANDARDS
OF CRIMINAL JUSTICE DISCOVERY AND PROCEDURE
BEFORE TRIAL

§2.1 Prosecutor's obligations.

(a) Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel the following material and information within his possession or control:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with their relevant written or recorded statements;

(ii) any written or recorded statements and the substance of any oral statements made by the accused, or made by a codefendant if the trial is to be a joint one;

(iii) those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of

scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(b) The prosecuting attorney shall inform defense counsel:

(i) if he has any relevant material or information which has been provided by an informant;

(ii) if there is any relevant grand jury testimony which has not been transcribed; and

(iii) if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party or of his premises.

(c) Except as is otherwise provided as to protective orders (section 4.4), the prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

(d) The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.

§2.2 Prosecutor's performance of obligations.

(a) The prosecuting attorney should perform his obligations under section 2.1 as soon as practicable following the filing of charges against the accused.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied or photographed, during specified, reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(c) The prosecuting attorney should ensure that a flow of information is maintained between the various investigative personnel and his office sufficient to place within his possession or control all material and information relevant to the accused and the offense charged.

§2.3 Additional disclosures upon request and specifications.

Except as is otherwise provided as to matters not subject to disclosure (section 2.6) and protective orders (section 4.4), the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(a) specified searches and seizures;

(b) the acquisition of specified statements from the accused; and

(c) the relationship, if any, of specified persons to the prosecuting authority.

§2.4 Material held by other governmental personnel.

Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the prosecuting attorney and which is in the possession or control of other governmental personnel, the prosecuting attorney shall use diligent good faith efforts to cause such material to be made available to defense counsel; and if the prosecuting attorney's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

34-1

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,940

FREDDIE M. ALSTON,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 24 1970

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 23,940

FREDDIE M. ALSTON,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The District Of Columbia
Court Of Appeals

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does a judge of the Juvenile Court have inherent authority to order pretrial discovery in a juvenile delinquency proceeding?

The District of Columbia Court of Appeals correctly answered this question "No."

2. Does the All Writs Statute authorize the Juvenile Court, in the exercise of its discretion, to issue the discovery order here in question in the absence of any finding by the court that such discovery is

(1) necessary to aid the court, (2) necessary for the development of facts relevant to disposition, or (3) necessary in order to insure a fair and meaningful trial?

The District of Columbia Court of Appeals did not answer this question because the question was not raised in that court.

3. Does denial of pretrial discovery in a juvenile delinquency proceeding necessarily result in a denial of due process of law?

The District of Columbia Court of Appeals correctly answered this question "No."

4. Does denial of pretrial discovery in a juvenile delinquency proceeding deprive appellant of equal protection of the law?

The District of Columbia Court of Appeals correctly answered this question "No."

5. Does denial of pretrial discovery in a juvenile delinquency proceeding necessarily deprive appellant of his right to effective assistance of counsel and of his right to confront and cross-examine adverse witnesses?

The District of Columbia Court of Appeals correctly answered this question "No."

ARGUMENT

I

A judge of the Juvenile Court has no inherent authority to compel pretrial discovery in juvenile delinquency cases.

Appellant first contends that a judge of the Juvenile Court has inherent discretionary authority to order pretrial discovery.

It is clear, as Wigmore states, that "[a]t common law, no right of inspection of documents before trial was conceded to the accused * **." (Emphasis in original.) 6 Wigmore on Evidence, § 1859g (3rd ed., 1940); and see cases collected at 7 A. L. R. 3rd 22 (1966). And in People ex rel. Lemon v. Supreme Court, 245 N. Y. 24, 156 N. E. 84 (1927), the late Supreme Court Justice Cardozo, then Chief Justice of the New York Court of Appeals, speaking for the Court with respect to the power of courts to order pretrial discovery, said:

"The common-law courts, till aided by statute, professed a lack of power, even in civil causes, to order the inspection of documents in advance of a trial, unless indeed the document to be examined was the very subject of the cause. * * *"
(156 N. E. at 84.)

While some courts have held that a trial court in a criminal proceeding has inherent discretionary power to order pretrial

discovery,¹ the Supreme Court in Bowman Dairy Co. v. United States, 341 U. S. 214, 219 (1951), stated, regarding Rule 16 of the Federal Rules of Criminal Procedure:

"Rule 16 deals with documents and other materials that are in the possession of the Government and provides how they may be made available to the defendant for his information. * * * Rule 16 provides the only way the defendant can reach such materials so as to inform himself." (Emphasis added.)

The clear implication of the above-quoted statement is that, in the absence of statute or rule, a United States District Court judge has no inherent authority to order the government to make documents available to a defendant in a criminal case prior to trial. See also: State v. Winsett, 200 A. 2d 237, 239 (Del., 1964); United States v. Anderson, 254 F. Supp. 177, 180-181 (W. D. Ark., 1966); and McSurely v. McClellan, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 23, 845, decided March 26, 1970; slip opinion, 11-12).

¹ See, e.g., dictum in Shores v. United States, 174 F. 2d 838, 845 (8th Cir., 1949); State v. Superior Court, 106 N. H. 228, 208 A. 2d 832 (1965), and cases collected at 7 A. L. R. 3rd 36 (1966). The cases upon which appellant relies, e.g., United States v. Smith, 16 F. R. D. 372 (W. D. Mo., 1954); United States v. Palmisano, 273 F. Supp. 750 (E. D. Pa., 1967); and United States v. Tucker, 262 F. Supp. 305 (S. D. N. Y., 1966), are inapposite as they relate to the scope of information that a defendant may request in a motion for a bill of particulars under Rule 7(f) of the Federal Rules of Criminal Procedure.

In the analogous area of discovery in civil cases, the Supreme Court in Union Pacific Railway Co. v. Botsford, 141 U. S. 250 (1891), held that, in the absence of statutory authorization, a Federal Circuit Court had no power to order a plaintiff in a personal injury suit to submit to a medical examination. And more recently, in Miner v. Atlass, 363 U. S. 641 (1960), the highest Court unanimously held that an admiralty court, in the absence of authorizing statute or valid rule, has no inherent power to order the taking of depositions for discovery purposes.² Accord, Hutchins v. Hutchins, 41 App. D. C. 367 (1914); Reed v. Allen, 121 Vt. 202, 153 A. 2d 74 (1959).

There appears to be no substantial reason why the principle announced in these cases should not also apply in the instant case. Thus, it appears that a judge of the Juvenile Court is without inherent authority to compel pretrial discovery.

² Three Justices dissented on the ground that the local rule permitting discovery by way of deposition was a valid exercise of the local court's rule-making power. The question of whether the Juvenile Court may promulgate discovery rules is not presented in this appeal, since the Juvenile Court has not promulgated any discovery rules. Cf. D. C. Code (1967), § 11-1526 and § 13-101.

II

The All Writs Act provides no basis for the
issuance of the Pretrial Discovery Order.

Appellant further contends that the All Writs Act, 28 U. S. C. § 1651, authorized the Juvenile Court judge to issue the pretrial discovery order in this case.³

The All Writs Act provides in pertinent part:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."⁴

It appears that the All Writs Act does apply to the Juvenile Court, as that court is a court "established by Act of Congress." 28 U. S. C. § 1651(a), supra; Morrow v. District of Columbia, ____ U. S. App. D. C. ____, 417 F. 2d 728, 734-735 (1969).

In arguing that the All Writs Statute authorized the issuance of the discovery order, appellant relies on Harris v. Nelson, 394 U. S. 286 (1969). In Harris v. Nelson, the Supreme Court ruled that,

³This contention was not advanced by appellant in the District of Columbia Court of Appeals, and hence not discussed in that Court in its opinion. See District of Columbia v. Jackson, D. C. App., 261 A. 2d 511 (1970).

⁴ Cf. D. C. Code (1967), § 11-1526.

pursuant to the All Writs Statute, a District Court could order a respondent in a habeas corpus case to respond to written interrogatories propounded by the incarcerated petitioner. The purpose of the statute, the Court stated, was to permit courts in the exercise of their discretion to issue "orders appropriate to assist them in conducting factual inquiries," to "arrange for procedures which will allow development * * * of the facts relevant to disposition," and "to do what is necessary in order that a fair and meaningful [habeas corpus] hearing may be held." Harris v. Nelson, supra, 394 U. S. 298-300.

Yet in the instant case, the Juvenile Court made no finding that pretrial discovery was necessary to assist it in conducting a factual inquiry. Nor was there a finding that discovery was necessary for development of facts relevant to disposition. And lastly, the Juvenile Court made no finding that appellant could not get "a fair and meaningful" trial if pretrial discovery were denied. In short, in issuing the discovery order, the Juvenile Court did not purport to exercise discretion, but rather held that appellant, as a matter of constitutional right, was entitled to the same discovery as would be afforded an adult under the Federal Rules of Criminal Procedure. (R. 38, 39.)

Thus, under the circumstances of this case, appellant cannot properly invoke the All Writs Statute as authorizing the Juvenile Court's order granting pretrial discovery.

III

The Due Process Clause of the Fifth Amendment does not compel pretrial discovery in a juvenile delinquency proceeding.

Appellant thirdly contends that, by virtue of the Due Process Clause of the Fifth Amendment, he is entitled to pretrial discovery.

It has been long established in this jurisdiction that a juvenile is entitled to due process of law. Pee v. United States, 107 U. S. App. D. C. 47, 50, 274 F. 2d 556, 559 (1959). However, even in the context of an adult criminal proceeding, it has been consistently held that, in the absence of a showing of prejudice, the refusal to allow pretrial discovery does not offend due process. Leland v. Oregon, 343 U. S. 790, 801 (1952); Cicenia v. Lagay, 357 U. S. 504, 510-511 (1958); Mears v. State, 422 P. 2d 230, cert. denied, 389 U. S. 888 (1967); and see Annotation: 7 A. L. R. 3rd 22, et seq. And no prejudice can be shown at this stage because there has been no trial and no delinquency adjudication. Thus, if due process of law does not compel pretrial discovery in a criminal case, a fortiori, it does not compel pretrial discovery in a juvenile delinquency proceeding.

Appellant also relies on Brady v. Maryland, 373 U. S. 83 (1963), and Giles v. Maryland, 386 U. S. 66 (1967), where the Supreme Court held that it is a violation of due process for the government to suppress evidence favorable to the accused in obtaining a conviction in a criminal case. It is clear, however, that Brady and Giles are of no help to appellant as he has neither alleged nor shown that the District of Columbia is in possession of or is suppressing evidence favorable to him. And Brady and Giles do not permit a defendant to rummage through the government's files on the ground that the government might be concealing evidence which may tend to be exculpatory.⁵ Williams v. Dutton, 400 F. 2d 797, 800-801 (5th Cir., 1968).

IV

Equal protection of the law does not compel pretrial discovery in juvenile delinquency proceedings.

Appellant next contends that it constitutes a denial of equal protection of the law for him to be denied pretrial discovery when pretrial

⁵ While appellant suggests that the Juvenile Court might examine, in camera, the government's documentary evidence to determine if any of it might tend to be exculpatory (brief 20), he has never requested the Juvenile Court to conduct such an examination. See Williams v. Dutton, supra.

discovery is permitted in criminal cases in the United States District Court. See Rule 16 and 17 of the Federal Rules of Criminal Procedure.

The Juvenile Court indeed appears to have grounded its ruling on the equal protection concept. In granting appellant's discovery motion, the court stated:

"* * * This Court believes Respondent in this Court would be entitled to the same discovery as an adult would be over at the United States District Court, or the Court of General Sessions." (R. 38.)

However, neither this Court, in its many decisions involving the rights of juveniles, nor the Supreme Court has ever looked to the equal protection concept as the source of the juvenile's right, but rather to the due process clauses of the Fifth and Fourteenth Amendments. For to rule that the criminal process and the juvenile process are so similar as to invoke the equal protection concept would result in such anomalous consequences as, e.g., that a juvenile charged with a felony-type offense could not be brought to trial in Juvenile Court except upon an indictment returned by a grand jury.

In the cases involving waiver by the Juvenile Court of its exclusive jurisdiction,⁶ this Court and the Supreme Court have implicitly

⁶ See D. C. Code (1967), § 11-1553.

rejected the equal protection approach in determining the scope of the juvenile's rights. In Watkins v. United States, 119 U. S. App. D. C. 409, 413, 343 F. 2d 278, 282 (1964), this Court described waiver as a "critically important action," and the Supreme Court, citing Watkins in Kent v. United States, 383 U. S. 541, 556 (1966), agreed, stating:

"It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile. * * * " (Emphasis added.)

It is clear that this Court and the Supreme Court would not have held waiver to be a "critically important action" unless the criminal and juvenile systems were regarded as substantially different. In short, the substantial differences between the two systems make inapplicable the equal protection principle.

V

The juvenile's right to effective assistance of counsel and his right to confront and cross-examine witnesses against him do not compel pretrial discovery.

Appellant lastly contends that, if he is denied pretrial discovery, his counsel will be unable to effectively assist him at trial and that he will be unable to adequately confront and cross-examine witnesses against him.

While pretrial discovery may indeed help counsel for appellant in his preparation for trial, appellant cites no case (and counsel for appellee is aware of none) holding that refusal to grant pretrial discovery effects a denial of his right to effective assistance of counsel or of his right to confront and cross-examine adverse witnesses. Such rights can be adequately protected during trial. If adverse evidence, of which appellant is unaware, is introduced, the Juvenile Court may, in its discretion, grant appellant a continuance so that he may effectively confront such evidence. See Leland v. Oregon, supra, 343 U. S. at 801-802; Mears v. State, supra, 422 P. 2d at 232-233. As this Court recently stated in McSurely v. McClellan, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 23, 845, decided March 26, 1970):

"* * * Restrictions upon discovery in criminal cases are directed primarily to the timing, rather than the fact of discovery itself. While a criminal defendant may not be entitled to 'discover' in advance of trial the contents of the government's case, he is obviously entitled to disclosure at the time of trial of the facts bearing upon his guilt or innocence. * * *

"* * * At least when constitutional claims are involved, the kind of fairness basic to criminal trials entitles defendants to reasonable continuances in order to prepare for further examination of unfriendly witnesses not previously available for interview or discovery, if their testimony requires an opportunity for preparation not possible before trial. * * *" (Slip op., 11-12; footnote omitted.)

CONCLUSION

Upon the foregoing, it is respectfully submitted that the decision of the District of Columbia Court of Appeals is correct and in accordance with law and should, accordingly, be affirmed.

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